

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

YVONNE C. BOIKO,	)	
	)	No. CV-06-258-CI
Plaintiff,	)	
	)	ORDER GRANTING PLAINTIFF'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	AND REMANDING FOR FURTHER
MICHAEL J. ASTRUE, Commissioner	)	PROCEEDINGS
of Social Security, <sup>1</sup>	)	
	)	
Defendant.	)	

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BEFORE THE COURT are Plaintiff's Motion for Summary Judgment (Ct. Rec. 13) and Defendant's Motion for Summary Judgment (Ct. Rec. 20), noted for hearing without oral argument on April 16, 2007. Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Leisa A. Wolf represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and **REMANDS** the

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<sup>1</sup>As of February 12, 2007, Michael J. Astrue succeeded Acting Commissioner Linda S. McMahon as Commissioner of Social Security. Pursuant to FED. R. CIV. P. 25(d)(1), Commissioner Michael J. Astrue should be substituted as Defendant, and this lawsuit proceeds without further action by the parties. 42 U.S.C. § 405(g).

1 matter to the Commissioner for further proceedings. (Ct. Rec. 13.)  
2 Defendant's Motion for Summary Judgment is **DENIED**. (Ct. Rec. 20.)

### 3 JURISDICTION

4 Plaintiff filed applications for Disability Insurance Benefits  
5 ("DIB") and for Supplemental Security Income on June 7, 2005,  
6 alleging an onset date of December 25, 2003. (Tr. 59-64, 65-68.)  
7 The applications were denied initially and on reconsideration. (Tr.  
8 33-36, 37-40, 43-46.) ALJ Mary Bennett Reed held a hearing on April  
9 14, 2006, and Plaintiff and vocational expert Deborah Lapoint  
10 testified. (Tr. 232-272.) On May 19, 2006, the ALJ issued a  
11 decision finding that Plaintiff was not disabled. (Tr. 11-24.) The  
12 Appeals Council denied a request for review on August 21, 2006.  
13 (Tr. 5-7). Therefore, the ALJ's decision became the final decision  
14 of the Commissioner, which is appealable to the district court  
15 pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for  
16 judicial review pursuant to 42 U.S.C. § 405(g) on September 8, 2006.  
17 (Ct. Rec. 4.)

### 18 STATEMENT OF FACTS

19 The facts have been presented in the administrative hearing  
20 transcript, the ALJ's decision, the briefs of both Plaintiff and the  
21 Commissioner, and will only be summarized here.

22 Plaintiff was 48 years old on the onset date, December 25,  
23 2003. (Tr. 22, 236.) She completed the eighth grade and did not  
24 earn a GED.<sup>2</sup> (Tr. 236-237.) Plaintiff worked for her in-laws at  
25

26 <sup>2</sup>Plaintiff testified that she completed the 8<sup>th</sup> grade and  
27 attended, but did not complete, the 9<sup>th</sup>. (Tr. 236-237.) Forms indicate  
28 Plaintiff completed the 9<sup>th</sup> (Tr. 82) and the 10<sup>th</sup> grade. (Tr. 113.)

1 a restaurant/lounge from 1980 to 2003 as a bartender, food server  
2 and cashier. (Tr. 73, 238-240.)

3 Plaintiff alleges disability due to degenerative arthritis  
4 resulting in neck and back pain, arthritis of the knees, and  
5 restless leg syndrome. (Tr. 77.) Plaintiff also alleges that she  
6 suffers from a somatoform disorder NOS.

### 7 SEQUENTIAL EVALUATION PROCESS

8 The Social Security Act (the "Act") defines "disability" as  
9 the "inability to engage in any substantial gainful activity by  
10 reason of any medically determinable physical or mental impairment  
11 which can be expected to result in death or which has lasted or can  
12 be expected to last for a continuous period of not less than twelve  
13 months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also  
14 provides that a Plaintiff shall be determined to be under a  
15 disability only if any impairments are of such severity that a  
16 Plaintiff is not only unable to do previous work but cannot,  
17 considering Plaintiff's age, education and work experiences, engage  
18 in any other substantial gainful work which exists in the national  
19 economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the  
20 definition of disability consists of both medical and vocational  
21 components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir.  
22 2001).

23 The Commissioner has established a five-step sequential  
24 evaluation process for determining whether a person is disabled. 20  
25 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is  
26 engaged in substantial gainful activities. If so, benefits are  
27 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not,  
28 the decision maker proceeds to step two, which determines whether

1 Plaintiff has a medically severe impairment or combination of  
2 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

3 If Plaintiff does not have a severe impairment or combination  
4 of impairments, the disability claim is denied. If the impairment  
5 is severe, the evaluation proceeds to the third step, which compares  
6 Plaintiff's impairment with a number of listed impairments  
7 acknowledged by the Commissioner to be so severe as to preclude  
8 substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii),  
9 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P, App. 1. If the  
10 impairment meets or equals one of the listed impairments, Plaintiff  
11 is conclusively presumed to be disabled. If the impairment is not  
12 one conclusively presumed to be disabling, the evaluation proceeds  
13 to the fourth step, which determines whether the impairment prevents  
14 Plaintiff from performing work which was performed in the past. If  
15 a Plaintiff is able to perform previous work, that Plaintiff is  
16 deemed not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv),  
17 416.920(a)(4)(iv). At this step, Plaintiff's residual functional  
18 capacity ("RFC") assessment is considered. If Plaintiff cannot  
19 perform this work, the fifth and final step in the process  
20 determines whether Plaintiff is able to perform other work in the  
21 national economy in view of Plaintiff's residual functional  
22 capacity, age, education and past work experience. 20 C.F.R. §§  
23 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137  
24 (1987).

25 The initial burden of proof rests upon Plaintiff to establish  
26 a *prima facie* case of entitlement to disability benefits. *Rhinehart*  
27 *v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v. Apfel*, 172  
28 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is met once

1 Plaintiff establishes that a physical or mental impairment prevents  
2 the performance of previous work. The burden then shifts, at step  
3 five, to the Commissioner to show that (1) Plaintiff can perform  
4 other substantial gainful activity, and (2) a "significant number of  
5 jobs exist in the national economy" which Plaintiff can perform.  
6 *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup> Cir. 1984).

7 Plaintiff has the burden of showing that drug and alcohol  
8 addiction ("DAA") is not a contributing material factor to  
9 disability. *Ball v. Massanari*, 254 F.3d 817, 823 (9<sup>th</sup> Cir. 2001).  
10 The Social Security Act bars payment of benefits when drug addiction  
11 and/or alcoholism is a contributing factor material to a disability  
12 claim. 42 U.S.C. §§ 423(d)(2)(C) and 1382(a)(3)(J); *Sousa v.*  
13 *Callahan*, 143 F.3d 1240, 1245 (9<sup>th</sup> Cir. 1998). If there is evidence  
14 of DAA and the individual succeeds in proving disability, the  
15 Commissioner must determine whether the DAA is material to the  
16 determination of disability. 20 C.F.R. §§ 404.1535 and 416.935. If  
17 an ALJ finds that the claimant is not disabled, then the claimant is  
18 not entitled to benefits and there is no need to proceed with the  
19 analysis to determine whether alcoholism is a contributing factor  
20 material to disability. However, if the ALJ finds that the claimant  
21 is disabled and there is medical evidence of drug addiction or  
22 alcoholism, then the ALJ must proceed to determine if the claimant  
23 would be disabled if he or she stopped using alcohol or drugs.  
24 *Bustamante v. Massanari*, 262 F.3d 949 (9<sup>th</sup> Cir. 2001).

#### 25 STANDARD OF REVIEW

26 Congress has provided a limited scope of judicial review of a  
27 Commissioner's decision. 42 U.S.C. § 405(g). A court must uphold  
28 the Commissioner's decision, made through an ALJ, when the

determination is not based on legal error and is supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup> Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999). "The [Commissioner's] determination that a plaintiff is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup> Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9<sup>th</sup> Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On review, the court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989) (*quoting Kornock v. Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

It is the role of the trier of fact, not this court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary*

1 of Health and Human Services, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1987).  
2 Thus, if there is substantial evidence to support the administrative  
3 findings, or if there is conflicting evidence that will support a  
4 finding of either disability or nondisability, the finding of the  
5 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
6 1230 (9<sup>th</sup> Cir. 1987).

#### 7 **ALJ'S FINDINGS**

8 The ALJ found at the onset that Plaintiff meets the  
9 nondisability requirements and is insured for disability benefits  
10 through December 31, 2007. (Tr. 15-16.) The ALJ found at step one  
11 that Plaintiff has not engaged in substantial gainful activity  
12 during any time at issue. (Tr. 17.) At step two, the ALJ found  
13 that the medical evidence established that Plaintiff suffered from  
14 the severe impairment of degenerative disc disease of the cervical  
15 spine. (Tr. 17-18.) She found that Plaintiff's impairments of  
16 restless leg syndrome and knee pain are non-severe, and that there  
17 is no evidence of a medically determinable severe mental impairment.  
18 (Tr. 17-19.) At step three, the ALJ found that Plaintiff does not  
19 have an impairment or combination of impairments listed in or  
20 medically equal to one of the Listings impairments. (Tr. 19.)

21 After finding Plaintiff's testimony regarding her limitations  
22 not fully credible, the ALJ concluded at step four that Plaintiff  
23 has the RFC to perform a less than full range of unskilled work at  
24 the sedentary and light exertion levels. (Tr. 19-20, 22.) The ALJ  
25 concluded that Plaintiff is unable to perform her past work. (Tr.  
26 22.) At step five, the ALJ considered Plaintiff's age, education,  
27 and work experience, determined that Plaintiff has no transferable  
28 skills and relied on the vocational expert's testimony to determine

1 that a significant number of jobs exist that Plaintiff can perform.  
2 (Tr. 22-24.) The ALJ determined that Plaintiff is not disabled  
3 within the meaning of the Social Security Act. (Tr. 24.) Because the  
4 ALJ determined at step five that Plaintiff was not disabled, she did  
5 not consider whether alcohol or drug abuse are contributing factors  
6 material to disability.

#### 7 **ISSUES**

8 Plaintiff contends that the Commissioner erred as a matter of  
9 law. Specifically, she argues that the ALJ erred by failing to  
10 properly credit the opinion of examining psychologist Dennis R.  
11 Pollack that she suffers from a severe mental disorder, a somatoform  
12 disorder NOS. (Ct. Rec. 14 at 11-13.) Plaintiff also argues that  
13 "the ALJ failed to properly consider her new age category" (age 50  
14 on the hearing date) when making her decision. (Ct. Rec. 14 at 10-  
15 12.) The first issue is dispositive.

16 The Commissioner opposes the Plaintiff's motion for summary  
17 judgment and asks that the ALJ's decision be affirmed. (Ct. Rec. 21  
18 at 9.)

#### 19 **DISCUSSION**

##### 20 **A. Weighing Medical Evidence**

21 In social security proceedings, the claimant must prove the  
22 existence of a physical or mental impairment by providing medical  
23 evidence consisting of signs, symptoms, and laboratory findings; the  
24 claimant's own statement of symptoms alone will not suffice. 20  
25 C.F.R. § 416.908. The effects of all symptoms must be evaluated on  
26 the basis of a medically determinable impairment which can be shown  
27 to be the cause of the symptoms. 20 C.F.R. § 416.929. Once medical  
28 evidence of an underlying impairment has been shown, medical



1 findings are not required to support the alleged severity of  
2 symptoms. *Bunnell v. Sullivan*, 947, F.2d 341, 345 (9<sup>th</sup> Cir. 1991).

3 A treating or examining physician's opinion is given more  
4 weight than that of a non-examining physician. *Benecke v. Barnhart*,  
5 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004). If the treating or examining  
6 physician's opinions are not contradicted, they can be rejected only  
7 with "clear and convincing" reasons. *Lester v. Chater*, 81 F.3d 821,  
8 830 (9<sup>th</sup> Cir. 1996). If contradicted, the ALJ may reject an opinion  
9 if he states specific, legitimate reasons that are supported by  
10 substantial evidence. See *Flaten v. Secretary of Health and Human*  
11 *Serv.*, 44 F.3d 1453, 1463 (9<sup>th</sup> Cir. 1995). In addition to medical  
12 reports in the record, the analysis and opinion of a non-examining  
13 medical expert selected by an ALJ may be helpful to the  
14 adjudication. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9<sup>th</sup> Cir. 1995)  
15 (citing *Magallanes v. Bowen*, 881 F.2d 747, 753 (9<sup>th</sup> Cir. 1989)).  
16 Testimony of a medical expert may serve as substantial evidence when  
17 supported by other evidence in the record. *Id.*

18 Plaintiff contends that the ALJ erred by failing to credit Dr.  
19 Pollack's opinion that she suffers from the severe mental impairment  
20 of a somatoform disorder, NOS. (Ct. Rec. 14 at 12-13.) The ALJ  
21 rejected Dr. Pollack's report because it was based on Plaintiff's  
22 unreliable self-report and was obtained on the advice of counsel to  
23 obtain benefits; Plaintiff argues that these are not specific and  
24 legitimate reasons supported by substantial evidence. The  
25 Commissioner responds that the ALJ may appropriately reject a  
26 medical opinion based on less than credible self-reporting, and when  
27 objective medical evidence does not support a doctor's assessed  
28 greater limitations. (Ct. Rec. 21 at 6.)

1 Psychologist Dennis R. Pollack, Ph.D., examined Plaintiff on  
2 March 13, 2006. (Tr. 216-222.) Dr. Pollack reviewed Plaintiff's  
3 medical records, including her physical therapy records, and  
4 administered psychological testing, including the Wechsler Adult  
5 Intelligence Scale, MMPI-2, Stroop Color and Word Test, and the  
6 Trail Making Test. (Tr. 216, 220-222.) Plaintiff told Dr. Pollack  
7 that her medication for restless leg syndrome ("RLS"), lorazepam,  
8 seems to help, and it helps her neck and back, but sometimes makes  
9 her feel disoriented. (Tr. 218.) She described memory difficulties  
10 and a habit of counting. (Tr. 218.) Even with the medication, RLS  
11 still awakens Plaintiff; sometimes back or neck pain does as well.  
12 (Tr. 220.) Plaintiff had never had a psychological evaluation or  
13 counseling. (Tr. 218.) She was cited for driving while under the  
14 influence on her 50<sup>th</sup> birthday but was taking the case to trial.  
15 (Tr. 219.)

16 Dr. Pollack's testing revealed IQ scores in the average  
17 (verbal) and high average (performance IQ) range. (Tr. 220.)  
18 Plaintiff's MMPI-2 showed an elevated F scale "which suggests that  
19 she may have been exaggerating her difficulties." (Tr. 221.) Dr.  
20 Pollack opined that the elevation could, however, be an honest  
21 presentation of self--i.e., a likely valid profile but with some  
22 symptom exaggeration. (Tr. 221.) Dr. Pollack noted marked  
23 elevation in six of Plaintiff's clinical scales. (Tr. 221.) He  
24 diagnosed a somatoform disorder, NOS, and assessed a GAF of 60.<sup>3</sup>

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26 <sup>3</sup>A Global Assessment of Functioning (GAF) of 60 indicates  
27 moderate symptoms ( e.g., flat affect and circumstantial speech,  
28 occasional panic attacks) or moderate difficulty in social

1 (Tr. 222.)

2 On April 11, 2006, Dr. Pollack opined that Plaintiff was  
3 moderately limited in the ability to perform within a schedule, to  
4 complete a normal workday, and to accept instructions and respond  
5 appropriately to criticism from supervisors. (Tr. 224.)

6 In assessing Dr. Pollack's opinion, the ALJ points out that  
7 Plaintiff was referred by her attorney to Dr. Pollack in March of  
8 2006. (Tr. 18.) To the extent the ALJ relied on the purpose of  
9 obtaining the report to discredit it, this was error. *See Lester v.*  
10 *Chater*, 81 F.3d 821, 832 (9<sup>th</sup> Cir. 1996).

11 The ALJ also rejected Dr. Pollack's opinion because: (1) prior  
12 to this assessment, there were no allegations of mental disability;  
13 (2) Plaintiff's IQ and working memory index scores indicate average  
14 functioning in both areas; (3) Part B is the much more difficult  
15 section of the Trail Making Test; yet Plaintiff performed worse on  
16 Part A; (4) the test results do not indicate the presence of  
17 significant cognitive or otherwise functional deficits in  
18 psychological functioning; and (5) the MMPI-2 shows that Plaintiff  
19 is exaggerating her physical complaints. (Tr. 18-19.)

20 The ALJ rejected Dr. Pollack's three assessed areas of  
21 moderately impaired functional limitation because: (1) problems with  
22 social interaction do not appear in Plaintiff's work history, her  
23 physician's notes, or her physical therapy records; (2) no evidence  
24 supports an inability to maintain a schedule or punctuality, and

25 \_\_\_\_\_  
26 occupational or school functioning ( e.g., few friends, conflicts  
27 with peers or co-workers). DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL  
28 DISORDERS, 4<sup>th</sup> Ed. (DSM-IV) (1995), at 32.

1 evidence of Plaintiff's ability to drive 130 miles to her weekly  
2 physical therapy appointments on time suggests the opposite; (3)  
3 Plaintiff's activities of daily living are inconsistent with Dr.  
4 Pollack's assessed limitations; and (4) the assessment appears to be  
5 influenced to a great degree by Plaintiff's unreliable self-report.  
6 (Tr. 19.)

7       The ALJ is partially correct that no evidence seems to support  
8 Dr. Pollack's limitation with respect to Plaintiff's social  
9 interaction. Plaintiff's work history, as well as her physician's  
10 and physical therapist's records, reflect no difficulties in social  
11 functioning. However, physician's and physical therapist's notes  
12 are not necessarily expected to reflect problems in social  
13 functioning. Plaintiff's reports indicate that her social  
14 activities have remained unchanged since her conditions began, she  
15 gets along well with authority figures, and she talks and visits  
16 with others (Tr. 121-123), but the ALJ does not rely on this  
17 evidence. Perhaps of significance with respect to the ability to  
18 accept criticism from supervisors, Plaintiff's entire work history  
19 has been with family (in-laws), rather than in a more competitive  
20 work environment -- a factor not mentioned by the ALJ. Arguably  
21 there is a lack of evidence of Plaintiff's ability to accept  
22 instructions and respond appropriately to criticism from  
23 supervisors; this alone is not medical evidence clearly establishing  
24 that Plaintiff did not have a medically severe impairment. See  
25 *Webb*, 433 F.3d at 687, see also *Yuckert*, 841 F.2d at 306.

26       The ALJ also discredited Dr. Pollack's opinion as based on  
27 Plaintiff's unreliable self-report; however, Dr. Pollack's diagnosis  
28 appears to take into account a degree of unreliable self-reporting.

1 He reviewed Plaintiff's medical records, interviewed her, and  
2 reviewed the results of psychological testing, including Plaintiff's  
3 MMPI-2 score, which Dr. Pollack opined could be read as an honest  
4 presentation of self--i.e., a likely valid profile but with some  
5 symptom exaggeration. (Tr. 221.) He diagnosed a somatoform  
6 disorder, NOS.<sup>4</sup>

7 Moreover, Dr. Pollack's opinion is not refuted by any other  
8 examining or treating physician. In this context, rejecting the  
9 examining physician's "assessment and findings because they have  
10 been influenced to a great degree by the claimant's own self report"  
11 (Tr. 19) does not amount to "substantial evidence clearly  
12 establishing the lack of a medically severe impairment." *See Webb*,  
13 433 F.3d at 687.

14 With respect to Plaintiff's activities of daily living that are  
15 inconsistent with Dr. Pollack's assessed limitations, the ALJ cites  
16 Exhibit 4E, Daily Function Report, at Tr. 99-106.<sup>5</sup> The ALJ does not  
17 specify which activities are inconsistent with the assessment; a  
18 reading of the sometimes difficult handwriting reveals that

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19  
20 <sup>4</sup>The Essential feature of a Somatization Disorder is a pattern  
21 of recurring, multiple, clinically significant somatic complaints.  
22 A somatic complaint is considered to be clinically significant if it  
23 results in medical treatment (e.g., the taking of medication) or  
24 causes significant impairment in social, occupational, or other  
25 important areas of functioning. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL  
26 DISORDERS, 4<sup>th</sup> Ed. (DSM-IV) (1995), at 446.

27 <sup>5</sup>Donna Lee Boiko, Plaintiff's mother-in-law, signed as the  
28 person completing the report. (Tr. 106.)

1 Plaintiff's mother-in-law described Plaintiff's daily activities as:  
2 eating breakfast, taking a shower, feeding animals, doing laundry  
3 and housework, and driving for her spouse. (Tr. 99-100.) Plaintiff  
4 cannot lift items, can only sleep in certain positions, and her legs  
5 bother her. (Tr. 100.) She needs to be reminded to take medication  
6 at night for her legs, she cannot lift pots and pans, and has  
7 trouble carrying dishes. (Tr. 101.) Plaintiff cannot sit in one  
8 position for any length of time and needs to be reminded of her  
9 appointments; she can lift 5 pounds, stand for 5-10 minutes, and sit  
10 for 10-15 minutes. (Tr. 103-104.) She has to stop and reread  
11 written instructions to get them right. (Tr. 104.)

12 The evidence of daily activities cited by the ALJ does not  
13 appear to specifically contradict Dr. Pollack's assessed  
14 limitations. Exhibit 4E includes evidence of memory problems,  
15 possibly related to medication, as Plaintiff testified. The  
16 remaining reason the ALJ rejected Dr. Pollack's opinion was  
17 Plaintiff's ability to drive 130 miles to physical therapy  
18 appointments one to two times a week and arrive on time; the ALJ  
19 opines that this undercuts Dr. Pollack's opinion that Plaintiff is  
20 moderately limited in her ability to perform activities within a  
21 schedule, maintain regular attendance, and be punctual within  
22 customary tolerances. (Tr. 19, citing Tr. 224.) It may be inferred  
23 that the ability to arrive in a timely fashion once or twice weekly  
24 is easier than five times a week, as required by most competitive  
25 employment. As noted, Dr. Pollack's opinion is unrefuted by other  
26 examining or treating physicians. The evidence relied on by the ALJ  
27 does not clearly establish the lack of a medically severe impairment  
28 or combination of impairments. *See Webb*, 433 F.3d at 687, *see also*

1 Yuckert, 841 F.2d at 306.

2 An impairment or combination of impairments may be found "not  
3 severe *only if* the evidence establishes a slight abnormality that  
4 has no more than a minimal effect on an individual's ability to  
5 work." *Webb v. Barnhart*, 433 F.3d 683, 686-687 (9<sup>th</sup> Cir. 2005)  
6 (citing *Smolen v. Chater*, 80 F.3d 1273, 1290 (9<sup>th</sup> Cir. 1996); see  
7 *Yuckert v. Bowen*, 841 F.2d 303, 306 (9<sup>th</sup> Cir. 1988). If an  
8 adjudicator is unable to determine clearly the effect of an  
9 impairment or combination of impairments on the individual's ability  
10 to do basic work activities, the sequential evaluation should not  
11 end with the not severe evaluation step. S.S.R. No. 85-28 (1985).  
12 Step two, then, is a "de minimus screening device [used] to dispose  
13 of groundless claims," *Smolen*, 80 F.3d at 1290, and an ALJ may find  
14 that a claimant lacks a medically severe impairment or combination  
15 of impairments only when his conclusion is "clearly established by  
16 medical evidence." S.S.R. 85-28. The question on review is whether  
17 the ALJ had substantial evidence to find that the medical evidence  
18 clearly established that the claimant did not have a medically  
19 severe impairment or combination of impairments. *Webb*, 433 F.3d at  
20 687; see also *Yuckert*, 841 F.2d at 306.

21 Dr. Pollack's opinion, unrefuted by any examining or treating  
22 physician, establishes more than a "slight abnormality that has no  
23 more than a minimal effect" on Plaintiff's ability to work. See  
24 *Webb*, 433 F.3d at 683 (citing *Smolen v. Chater*, 80 F.3d 1273, 1290  
25 (9<sup>th</sup> Cir. 1996); and see *Yuckert v. Bowen*, 841 F.2d 303, 306 (9<sup>th</sup> Cir.  
26 1988). As such, the assessment meets the de minimus requirement  
27 used to dispose of groundless claims at step two. See *Smolen*, 80  
28 F.3d at 1290. The ALJ could find that Plaintiff lacked a medically

1 severe impairment or combination of impairments only if the  
2 conclusion was "clearly established by medical evidence." See  
3 S.S.R. 85-28. Though Plaintiff ultimately bears the burden of  
4 establishing her disability, the ALJ has an affirmative duty to  
5 supplement Plaintiff's medical record, to the extent it was  
6 incomplete, before rejecting this impairment at so early a stage in  
7 the analysis, particularly in light of the fact that the examining  
8 physician's opinion was uncontradicted. "In Social Security cases  
9 the ALJ has a special duty to fully and fairly develop the record  
10 and to assure that the claimant's interests are considered." *Webb*,  
11 433 F.3d at 687, citing *Brown v. Heckler*, 713 F.2d 441, 443 (9<sup>th</sup> Cir.  
12 1983) (per curiam).

13 The ALJ's finding at step two that Plaintiff has no mental  
14 impairment or one that is non-severe, is not clearly established by  
15 medical evidence. Accordingly, the case must be remanded for  
16 additional proceedings to correct the legal error.

#### 17 CONCLUSION

18 Having reviewed the record and the ALJ's conclusions, this  
19 court finds that the ALJ's decision at step two that Plaintiff does  
20 not have a mental impairment or has one that is non-severe is not  
21 clearly established by the medical evidence. Because the ALJ  
22 committed this error at step two, the case is remanded for further  
23 proceedings to determine: whether Plaintiff suffers from a severe  
24 mental impairment, alone or in combination with Plaintiff's other  
25 impairments; whether the ALJ's rejection at step two of knee pain  
26 and restless leg syndrome is clearly established by medical  
27 evidence, and, if appropriate in light of Plaintiff's DUI charge, to  
28 conduct the *Bustamante* analysis with respect to Plaintiff's use of



1 alcohol.

2 **IT IS ORDERED:**

3 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is  
4 **GRANTED.** The matter is remanded to the Commissioner of Social  
5 Security for further proceedings consistent with the this decision  
6 and sentence four of 42 U.S.C. §§ 405(g).

7 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 20**) is  
8 **DENIED.**

9 The District Court Executive is directed to file this Order,  
10 provide copies to counsel for Plaintiff and Defendant, enter  
11 judgment in favor of Plaintiff, and **CLOSE** this file.

12 DATED April 20, 2007.

13  
14 S/ CYNTHIA IMBROGNO  
15 UNITED STATES MAGISTRATE JUDGE  
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